No. 320

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

SOUTHERN STEAMSHIP COMPANY,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

NATIONAL MARITIME UNION OF AMERICA,
Intervenor.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL MARITIME UNION OF AMERICA, INTERVENOR

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Opinions Below

The findings of fact, conclusions of law, and order of the National Labor Relations Board were filed on April 22, 1940, and are reported in 23 N. L. R. B., No. 2 (R. 14-44).

The opinion of the United States Circuit Court of Appeals for the Third Circuit was filed on May 6, 1941, and is reported in *Southern Steamship Company* v. *National Labor Relations Board*, 120 Fed. (2d) 505 (C. C. A. 3), (R. 769-785).

Jurisdiction

The jurisdiction of this Court to review the final decree of the Circuit Court of Appeals for the Third Circuit on a writ of certiorari is conferred by Section 240 (a) of the Judicial Code, as amended by Act of Feb. 13, 1925, c. 229, Sec. 1, 43 Stat. 938 (28 U. S. C. A., Sec. 347 (a) and Section 10 (e) and (f) of the National Labor Relations Act, July 5, 1935, c. 372, Sec. 10, 49 Stat. 453 (29 U. S. C. A., Sections 160 (e) and (f)).

Statement of the Case

Upon charges filed by the National Maritime Union of America (C.I.O.), herein called the Union,[1] the National Labor Relations Board, herein called the Board, instituted proceedings against the Southern Steamship Company, herein called the petitioner, charging that the petitioner had engaged in certain unfair labor practices affecting commerce, within the meaning of Section 8 (1), (3) and (5) and Section 2 (6) and (7) of the National Labor Relations Act, herein called the Act[2] (R. 60-67).

The Board's complaint alleged, in substance (a) that petitioner had refused to bargain collectively with the Union, despite the latter's certification by the Board as the exclusive representative of the employees in an appropriate unit (R. 64-65); (b) that as a result of this unlawful conduct, a strike occurred on July 18, 1938, on petitioner's steamship *City of Forth Worth* while moored to the dock at Houston, Texas (R. 65); (c) that petitioner thereafter, on July 25, 1938, discharged five named employees because of their Union membership and participation in the strike (R. 65-66); (d) that as a result of the

(1) The National Maritime Union of America was permitted to intervene as a party to the proceedings in the United States Circuit Court of Appeals for the Third Circuit by order entered September 16, 1940 (R. 767).

(2) See Appendix, infra, pp. 30-32.

discharges, the employees of the *City of Fort Worth* on July 25, 1938, went on strike, while that vessel was moored to the dock at Philadelphia (R. 66).

Upon hearings duly held,[3] the Board found petitioner engaged in interstate commerce[4] and guilty of the unfair labor practices with which it had been charged (R. 14-44). The Board accordingly directed the petitioner to cease and desist from the unfair labor practices found (R. 41). In addition, as affirmative action to effectuate the policies of the Act, the Board ordered the petitioner (a) upon request, to bargain collectively with the Union, as exclusive representative of the employees of the appropriate unit (ibid.); (b) to offer reinstatement with back pay to the five employees discriminated against (R. 42-43); (c) upon application, to offer to six other employees, who went on strike on July 25, 1938, reinstatement to their former or substantially equivalent positions, dismissing, if necessary, those who were hired to replace them (R. 43); and (d) to post notices (R. 43-44).

The order has been affirmed by the Circuit Court of Appeals for the Third Circuit and a decree of enforcement has been entered therein (R. 769-789).

The case now comes before this Court upon writ of certiorari, where petitioner seeks to have the decree of the Court below reversed and the cause remanded to said Court with directions to set aside and vacate the findings, conclusions, decision and order of the Board, and to order the Board to dismiss the complaint against the petitioner.

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(3) Petitioner has raised no issue as to the administrative aspects of a "fair hearing" during the proceedings.

(4) Petitioner has conceded that it is engaged in interstate commerce (R. 68). It is stipulated that it is a Delaware corporation with principal office in Philadelphia, Pa., and that it owns and operates seven vessels, carrying freight between the ports of Philadelphia and Houston. During 1937, petitioner's vessels carried 341,581 tons of freight, representing revenue amounting to $1,991,351 (R. 669-670, Bd. Exh. 3).

The Facts

The Certification of the Union

On July 16, 1937, following the hearing upon a petition to certify collective bargaining representatives, the Board directed an election to be held by a unit of petitioner's employees, consisting of the unlicensed personnel employed in the deck, engine and stewards' departments.[5] The election held on petitioner's 7 vessels disclosed a majority in favor of the Union, and on January 26, 1938, the Board certified the Union as the exclusive bargaining representative of the employees in the unit designated (R. 671-674, Bd. Exh. 4).[6] The propriety of the bargaining unit has not been challenged by the petitioner, and was reaffirmed by the Board in the instant proceedings (R. 19, 20-21).

The election, however, was challenged by the petitioner as improperly conducted. At the election held on the first of petitioner's vessels, the Board had refused, in the absence of consent of the labor organizations involved, to permit the petitioner's representatives to be present to identify the voters and observe the balloting. At the elections held on the six other vessels such consent was given and company representatives were present. The Board dismissed a petition to vacate the election, holding that certification proceedings were non-adversary and that, in the absence of Union consent, the exclusion of employer representatives was within its discretionary power (R. 671-674, Bd. Exh. 4).[7]

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(5) *Matter of American-France Line, et al. (Southern Steamship Co.) and International Seamen's Union of America*, 3 N. L. R. B. 64. Wireless and radio operators, chief electricians on electrically driven ships, and junior engineers holding licenses were excluded from the unit.

(6) *Matter of American-France Line, et al. (Southern Steamship Co.) and International Seamen's Union of America*, 4 N. L. R. B. 1140. Of a total of 134 eligible voters in the appropriate unit, 132 votes were cast: 73 for the Union, 4 for the International Seamen's Union of America, and 51 for neither; 1 ballot was blank and 3 were challenged (R. 672).

(7) Ibid.

Petitioner in the instant case, in defense of its refusal to engage in collective bargaining, renewed its complaint that the certification of the Union was invalid (R. 69-71). It argued that as a matter of law[8] an employer's representative is entitled to be present during an employees' election, independent of Union consent. The Board rejected that contention and reaffirmed its original ruling (R. 19-21). The correctness of the Board's position has been upheld by the Circuit Court of Appeals (R. 771). Whether this was reversible error is one of the three questions presented by petitioner to this Court for review (Pet. Brief, p. 8).

Petitioner's Refusal to Bargain with the Union

The Board's complaint alleged that on January 26, 1938, the date of the Union's certification, and at all times thereafter, petitioner refused to bargain collectively with the Union as the exclusive representative of the employees in the unit designated (R. 63-66).

Petitioner denied that the Union had requested it to bargain collectively prior to August 18, 1938 (the date on which it received a registered letter from the Union requesting a conference), and alleged that on and after August 23, 1938 (the date on which it answered the letter of August 18), it maintained its position that pending a judicial determination of the validity of the election and certification, it was not required to recognize the Union. Petitioner also claimed that by reason of the unlawful acts of the employees in conducting a sit-down strike and refusing to obey orders on July 18, 1938, it was not thereafter

(8) At the hearing, the parties stipulated (R. 114):

"that no testimony will be taken on the issue raised by Respondent's answer as to the validity of the Board's certification of January 26, 1938, as embodied in Board's Exhibit No. 4, it being agreed that the validity of this certification depends upon the validity of the Board's ruling that in the absence of consent by the labor organizations involved, company representatives should not be permitted to be present at elections to determine collective bargaining representatives."

required to recognize the Union as the exclusive representative of its employees (R. 19, 70-71, 72).

The record reveals that shortly after the certification of January 26, 1938, Cunningham, a Union representative at Houston, requested Shreider, the petitioner's local representative, to arrange for a collective bargaining conference and the issuance of passes to the Union's shore delegates, without which they could not board petitioner's ships (R. 401, 589-592). Shreider replied that he did not have the authority to grant the requests but that he would transmit them to the Philadelphia office and communicate petitioner's answer to Cunningham (R. 590-592). Neither Cunningham nor the Union thereafter heard from Shreider (R. 592).

At about the same time, in Philadelphia, during the "latter part of January or the first part of the week in February", Palazzi, the Union's business agent, telephoned Sherry, petitioner's marine superintendent, and requested a collective bargaining conference (R. 91-93, 111-112, 515). Sherry replied that the matter was in the hands of petitioner's attorney (R. 93). Hearing no further from petitioner by the middle of February, Palazzi wrote Sherry again requesting a bargaining conference (R. 94-96, 110). He received no reply (R. 121). Later, in February, and again in March, Palazzi made two further attempts to reach Sherry by phone but was told each time that Sherry was out (R. 96-97). On both occasions Palazzi left word for Sherry to call him but Sherry never did (R. 97, 108-109). Palazzi then attempted to reach Sherry personally at petitioner's docks (R. 97) but when he reached the docks he was stopped by petitioner's watchman who, upon learning Palazzi's identity, refused to allow him to enter Sherry's office (R. 98-99).

On August 18, 1938, after the strike of July 18 and the petitioner's discharge of the strikers on July 25, Palazzi sent Sherry a registered letter requesting a collective bargaining conference (R. 71, 106; Bd.'s Exh. 6, 675). On August 23, 1938, Sherry wrote Palazzi that until the va-

lidity of the Board's certification was settled by the Board and the Courts, the question of a collective bargaining agreement was premature (R. 71, 107; Bd.'s Exh. 7, 676). On cross-examination, superintendent Sherry admitted that "from the very time the Board certified the Union on January 26, 1938" petitioner consistently took "the position that it would not bargain with the Union" (R. 544-545).

Upon these facts the Board found that petitioner had refused to bargain with the Union at all times subsequent to January, 1938 (R. 22), and that it, therefore, was guilty of an unfair labor practice within the meaning of Secs. 7 and 8(5) of the Act (R. 22, 40). It accordingly ordered the petitioner to cease and desist from this practice and, upon request, to bargain with the Union (R. 41). These findings of fact and conclusions of law have been affirmed by the Circuit Court (R. 771).

The only reason now[9] assigned by the petitioner for its refusal to bargain with the Union is the alleged invalidity of the Union's certification by reason of the exclusion of its representatives during the balloting on the first ship (Pet.'s Brief, pp. 32-33). That it refused to bargain is not disputed.

The Strike of July 18, 1938

On July 17, 1938, thirteen unlicensed seamen of petitioner's vessel *The City of Fort Worth,* members of the Union, met at the Union's hall in Houston, Texas, to find out what had been accomplished by way of obtaining a bargaining conference and passes enabling shore delegates of the Union to board the Company's ships (R. 128-129, 179-181, 433, 593-594). Advised of petitioner's consistent refusal to meet or bargain with the Union, the men unani-

(9) On this appeal petitioner apparently has abandoned two of the three defenses originally advanced as justification for its refusal to bargain with the Union. It does not now contend that the evidence "does not furnish a substantial basis of fact from which it could reasonably be inferred that it refused to bargain with the Union prior to August 23, 1938" (Pet. Brief in the Circuit Court, pp. 42-44) Nor does it assert that after the strike of July 18, 1938, it was no longer required to recognize the Union (R. 19).

mously voted to go on strike the following morning in order to compel petitioner to recognize the Union and issue boarding passes to its delegates (R. 129-131, 180-181, 594-596).

Accordingly, at 8 A. M. on July 18, while the vessel was moored to the dock at Houston, the strike was put into effect when Tracey, an oiler, failed to turn the steam "on deck" for the purpose of loading cargo (R. 128, 131-133, 180-181, 197, 219, 269). Sufficient steam was maintained, however, to operate the fire alarms, the ice machine, the sanitary pumps and other safety appliances (R. 130-131, 182, 366, 401). The absence of steam was first noticed by the first assistant engineer Paul.[10] Upon inquiry he was informed by Tracey that the men were on strike for Union recognition and passes (R. 132). Paul said he would put the steam on deck himself and Tracey replied that in that event he would "have to take the firemen out of the fire room" (R. 132). When Paul turned the steam on, Braun, a fireman on duty and a member of the Union, left the fire room and joined the strike (R. 133). Braun's watch terminated at about this time and Ferguson appeared to relieve him (R. 134). Ferguson, a member of the Union, also refused to tend the fire and was ordered out of the fire room by Robinson, the second assistant engineer, who took over the care of the fires himself (R. 134, 179, 182, 355-356, 380-382). Tracey and Ferguson thereafter joined the eleven other strikers who were seated on the poop deck, the general meeting place of the seamen when off duty (R. 135-137, 182, 270-272, 500). The ship's officers, with the assistance of the six unlicensed seamen who did not participate in the strike, then proceeded with the necessary operations for the loading of cargo[11] (R. 317-319, 355-356, 381-382). The strikers made no effort to interfere with the firing of the boilers or with the loading but during the entire strike sat on the poop deck (R. 290-292, 293, 323-324, 375, 387-388, 404, 499-502).

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(10) Misnamed "Pool" in several instances (R. 23, 367).

(11) The actual loading of cargo was performed by stevedores (R. 132, 142, 269-270).

At about 10:30 A. M., the ship's captain, Rudan, came on board. He advised the strikers that their conduct was in violation of the ship's articles, which they had signed, and thereupon ordered them individually and collectively to return to their stations (R. 138, 165-166, 273-274, 382-383, 431-435). The strikers refused to do so. Their spokesman, Warren, explained that the men were justified in striking for Union recognition and boarding passes because of petitioner's refusal to accept the Union as the representative of the men (R. 167-169, 209-210, 431-435, 483). Later in the morning, Rudan brought aboard a deputy United States Shipping Commissioner, who reading from the shipping laws, advised the strikers that according to their articles, they had agreed "to be obedient to the lawful commands of the master", and warned them that they were "subject to be logged[12] two days for one" for not obeying orders (R. 437-440, 681, and Resp.'s Exh. 2). The men, however, refused to abandon the strike. Throughout the day they remained seated on the poop deck in an orderly manner (R. 137, 241-242, 290-291, 375, 387-388, 499-502). At no time were they ordered to leave the vessel; on the contrary, they were in regular course served their midday meal by one of their own members, Smith, a messboy (R. 205-206, 325, 404, 423-424, 513).

Late that afternoon of the same day Rayzor, petitioner's local attorney, after telephoning superintendent Sherry at Philadelphia, advised Mandell, the Union's attorney at Houston, that if the strike were called off he would recommend that petitioner issue boarding passes to the Union's shore delegates, and would meet with him the following week to negotiate an agreement (R. 541-542, 616-618, 642-643). Relying upon this promise, Mandell advised the men to terminate the strike and they complied (R. 147, 450-453, 620-621). The strike ended at 7 P. M. when the men resumed their stations, and that night at about 9 P. M. the ship sailed on schedule with crew intact (R. 147-149, 275, 292-293).

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(12) Forfeiture of wages for disobedience. See 46 U. S. C. 701(4).

Upon this wholly undisputed evidence, the Board found that the strike was precipitated by petitioner's unlawful refusal to recognize and bargain with the Union (R. 25). The finding has been affirmed by the Circuit Court (R. 772).

The Discharges on July 25, 1938

Despite the admission of the captain and several officers that the crew conducted themselves in a thoroughly competent manner on the return voyage to Philadelphia and "that they were a good crew, just as they always were a good crew"[13] (R. 376), it was nevertheless decided by the captain and the officers that five of the crew[14] who had participated in the strike were not to be reshipped (R. 295-297, 299-300, 375-377, 388, 454-458, 461-462, 502, 513, 516-517). When the vessel docked at Philadelphia on July 25, 1938, and these five men signed off their shipping articles, they were informed that they would not be re-engaged[15] (R. 151, 154-155, 185-186, 201-202, 223-225, 284, 338, 391, 394).

The Board found that petitioner had discharged the five men because of their collective activity in striking on July 18 (R. 32-37), and that this constituted an unfair labor practice within the meaning of Sec. 8 (1) and (3) of the Act (R. 26, 39-40). The Board accordingly ordered the petitioner to reinstate the five men and to compensate them for their lost earnings (R. 42). These findings have also been affirmed by the Circuit Court (R. 780).

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(13) Captain Rudan testified that he had no complaints to make about the conduct of the crew on the return voyage (R. 502). Second Assistant Engineer Robinson testified that he had told the strikers, "Well, boys, let's forget all about what happened; let's string along just as though nothing had happened" (R. 376). First mate Helland testified that he felt that he had a safe crew when he sailed from Houston (R. 299-300). The only complaint about the crew that appears on the record was made by Helland, who testified that Smith, the messboy, had said "Good morning kind of half-hearted like" (R. 295-297).

(14) Warren, Tracey, Ferguson, Pfuhl and Smith.

(15) Because of Ferguson's participation in the strike, the petitioner refused to pay him a bonus of $25 to which he was entitled for having worked a full year (R. 186).

The Strike of July 25, 1938

During the return voyage from Houston, the Union members of the crew, anticipating petitioner's reprisal, decided to strike if anyone of their number were discharged on the ship's arrival at the home port in Philadelphia (R. 150-151, 244). When, therefore, the Union members learned that five of their number had been discharged, the remainder,[16] with one exception[17] whom petitioner had resigned for another voyage, left the ship in protest (R. 156-157, 202, 226, 248-249, 255-256).

The Board having found that petitioner discharged the five men unlawfully, found further that those who ceased work on July 25, 1938, in protest against the discharges, engaged in a strike,[18] and that this strike was caused by petitioner's unfair labor practices (R. 26). It accordingly ordered the men reinstated (R. 49-50). These conclusions were also upheld by the Circuit Court (R. 780).

Summary of Intervenor's Argument

1. The certification of the Union was valid and petitioner refused to bargain collectively with the Union in violation of Sec. 8 (5) of the Act. The presence of an employer's representative is not essential to a fair election. The Act confers no such right upon the employer. The Board's action in excluding petitioner's representative from the election in the absence of Union consent was, therefore, a reasonable exercise of its discretionary power "to take a secret ballot of employees." *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586, 588 (C. C. A. 2). In any event, petitioner does not claim that it was in fact prejudiced by the absence of an observer nor that the election was conducted in other than a fair

(16) Crassavaz, Reeves, Lathan, Burns, Hughes, Neeley and Holt. Crassavaz was later reinstated at his own request.

(17) This employee was Braun.

(18) The finding that a strike occurred on July 25th is not disputed by petitioner.

and impartial manner. Since the Board's conduct of the election was fair, the certification of the Union was valid. Petitioner concedes that it refused to bargain collectively with the Union following its certification.

2. Petitioner's action in discharging five of the strikers because of their collective activities, was "discrimination in regard to hire" as well as "tenure of employment" in violation of Sec. 8 (1) and (3) of the Act. The signing off of the articles prior to the discharge did not terminate their employment relationship. *National Labor Relations Board* v. *Waterman SS. Corp.*, 309 U. S. 206. Shipping articles were never intended to initiate or terminate the status of employees. Such benefits as were originally derived from the compulsory signing on or off of articles are now outmoded in an era of union hiring halls and collective bargaining agreements. The presence or absence of articles or of proof of custom as to re-signing of articles is entirely irrelevant where the evidence, as here, clearly establishes that the discharges and the refusal to rehire were motivated solely by the union affiliation and activities of the men discriminated against.

3. In the absence of seizure or retention of the ship, danger or damage to it, violence, disorderly conduct, or disruption of the vessel's normal operations, the conduct of the men at Houston, was lawful concerted action. The *Fansteel* case is, therefore, inapplicable. Nor was the strike illegal because of the Mutiny Act. Legislation designed to curb the pirate and enforce involuntary servitude in an era of serfdom may not be applied to modern industrial relations. The legislative policy of this country for the past half century emphasizes the equality of rights enjoyed by all labor, and guarantees to maritime, as well as land workers, the right to strike, provided only that life and property are not thereby endangered. When moored to the dock in a safe port, the vessel is an industrial plant like any other factory. The safety of the vessel, not the name of the port, determines the legality of a seaman's strike.

I

The Board's exclusion, in the absence of Union consent, of petitioner's representatives at an election to determine employees' bargaining representative, was a reasonable exercise of discretion. Petitioner's conceded refusal to bargain collectively with the Union upon its certification was in violation of Section 8 (5) of the Act.

The sole excuse here assigned by petitioner for its refusal to bargain collectively with the Union is the alleged invalidity of the election which resulted in the Union's certification. Petitioner has stipulated that "the validity of this certification depends upon the validity of the Board's ruling that in the absence of consent by the labor organizations involved, company representatives should not be permitted to be present at elections to determine collective bargaining representatives" (R. 114). It asserts that "the right of an employer to have representatives present at an election * * * is not dependent upon the consent of the labor organizations involved" (Pet.'s Brief, p. 32). The issue presented, therefore, is whether the National Labor Relations Act confers such a right upon the employer.

The Act is silent as to employer participation in the conduct of an election. Section 9 (c) of the Act provides that the Board "may take a secret ballot of employees or utilize any other suitable method to ascertain" the desires of employees as to their representatives. A wide discretion is, therefore, vested in the Board as to the procedure by which the election shall be conducted. "The control of the election proceeding, and the determination of the steps necessary to conduct that election fairly were matters which Congress entrusted to the Board alone." *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U. S. 206, 226; see also *National Labor Relations Board* v. *Falk Corp.*,

308 U. S. 453, 458. "A certification proceeding is of a non adversary, fact-finding character in which the Board plays the part of a distinterested investigator seeking merely to ascertain the desires of the employees as to their representation." *Southern S.S. Co.* v. *National Labor Relations Board*, 120 Fed. (2d) 505-506 (C. C. A. 3); see also *American Federation of Labor* v. *National Labor Relations Board*, 308 U. S. 401, 406.

Whether or not employers should be permitted to have representatives present at an election involves several discretionary considerations. As stated in *Marlin-Rockwell Corp.* v. *National Labor Relations Board*, 116 Fed. (2d) 586-588 (C. C. A. 2):

> "If the Board desires the assistance of a representative of the employer to identify the employees who appear to vote, it may have it. But such assistance is not essential to a fair election; identification of the voters may be obtained by other means. Apparently the Board believes that considerations in favor of the presence of an employer representative are outweighed by the possibility that his presence may act as an inhibiting influence upon the employees' freedom of choice; hence the Board's general policy of denying permission unless the labor organization involved consents."

See also *Southern S.S. Co.* v. *National Labor Relations Board*, supra, p. 507.[19]

This policy, followed in the case at bar, was an entirely reasonable exercise of the Board's discretion in order to insure a fair election. The alleged danger that such a practice might permit ineligible persons to vote, is unreal. Even if the Board's agents should fail to identify those qualified to vote, the presence of two contending Unions provided sufficient insurance against improper balloting.

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(19) Exclusion of employers at employee elections is not novel: Lorwin & Wubnig, Labor Relations Board (Brookings Institute, 1935), pp. 159-161 (Administration of Sec. 7A of the N.I.R.A.); First Annual Report of the National Mediation Board, p. 4; Attorney General's Committee on Administrative Procedure, Railway Labor, Monograph No. 17, pp. 49-56 (representation cases before National Mediation Board under Railway Labor Act).

In fact, there is no showing that the procedure adopted prevented a fair election. Petitioner does not assert that any person not entitled to vote did so, or that the election was conducted in other than a fair and impartial manner. Indeed, the record shows that doubtful votes were challenged (R. 672). In the absence of any showing of actual prejudice, petitioner's argument is purely hypothetical and must, therefore, fall. See: *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 350-351.

As previously stated, petitioner does not now challenge the Board's finding that it refused to bargain with the Union after January 26, 1938. This finding could not very well be challenged because the evidence in support of it stands wholly without contradiction in the record. The Board's conclusion that petitioner's continuous refusal to bargain with the Union was in violation of Section 8 (5) of the Act should, therefore, be upheld. *National Labor Relations Board* v. *Columbian E. & Stamping Co.*, 306 U. S. 501, 507; *National Labor Relations Board* v. *Remington Rand, Inc.*, 94 Fed. (2d) 862 (C. C. A. 2), cert. den. 304 U. S. 576, 585; *McNeely & Price Co.* v. *National Labor Relations Board*, 106 Fed. (2d) 878 (C. C. A. 3); *National Labor Relations Board* v. *Somerset Shoe Company*, 111 Fed. (2d) 681 (C. C. A. 1); *National Labor Relations Board* v. *Lund*, 103 Fed. (2d) 815 (C. C. A. 8); *National Labor Relations Board* v. *National Motor Bearing Co.*, 105 Fed. (2d) 652 (C. C. A. 9).

II

The expiration of shipping articles does not terminate the employment relationship of seamen. It may not therefore serve petitioner as an excuse for the discriminatory discharge of the men.

The Board found that petitioner discharged the five men because of their collective activity in striking on July 18 (R. 32-37). It accordingly held that the discharges were

discriminatory and in violation of Section 8 (1) and (3) of the Act. There can be little doubt that the conclusion was proper, particularly in view of the fact that the concerted action of the men was provoked by petitioner's unfair labor practices. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-347; *National Labor Relations Board* v. *Remington Rand*, 94 Fed. (2d) 866, 870-871 (C. C. A. 2), cert. den. 304 U. S. 576, 585; *Black Diamond S.S. Corp.* v. *National Labor Relations Board*, 94 Fed. (2d) 875, 878-879 (C. C. A. 2), cert. den. 304 U. S. 579.

Petitioner asserts, however, that the men were not discharged but rather that their employment relationship automatically terminated when they signed off the shipping articles on July 25, 1938. The defense is untenable.

The decision of this Court in *National Labor Relations Board* v. *Waterman S.S. Corp.*, 309 U. S. 206, is decisive of the issue. The Court there declared that the statutory[20] requirement that seamen sign shipping articles at the beginning of each voyage and sign off the articles at its conclusion was intended solely for their protection and did not define the scope of the employment relationship. It was "never intended to forbid the parties from mutually undertaking to assure a crew the right to continue as employees and to re-sign if it desires after signing off articles at a voyage's end" (ibid., at p. 212). The Board could, therefore, properly hear evidence as to whether the crew had "a continuing tenure or relationship entitling them to re-sign" at the end of the voyage (ibid., at pp. 212-213).

As in the *Waterman* case, the evidence here amply supported the Board's finding that the expiration of the articles did not terminate the employment tenure of the five men who were dismissed by the petitioner. The men had been regularly employed over periods varying from six weeks to eighteen months on continuous round trip voyages which took approximately three weeks to complete

(20) 46 U. S. C. A., Secs. 564, 574. See Appendix, infra, pp. 53-54. "The protection to seamen embodied in the Federal statute * * * has existed in some form since the earliest days of the nation" (1 Stat. 131). *Waterman* case, supra, at p. 212.

(R. 124-125, 177-178, 194-196, 213, 278). Generally, it was petitioner's custom to have its seamen sign on new articles simultaneously with the signing off of the old (R. 153-154, 184-185, 199-201, 221-223, 300-301). On those occasions when this did not happen the men considered themselves engaged and were so treated by the petitioner notwithstanding the temporary absence of new articles (ibid.). Significantly, even petitioner's officers referred to the men as having been "discharged" upon the arrival of the vessel at Philadelphia (R. 201-202, 224-225, 284, 338, 390-391, 394, 461, 491-515). Sufficient evidence was present, therefore, to warrant the Board's conclusion that petitioner, "like maritime people generally", had adopted the custom and followed the principle that "a seaman's tenure and relationship to his ship and employer are not terminated by the mere expiration of articles" (ibid., at p. 218).

It follows that petitioner can derive no comfort even from its own formulation of the principle that tenure ceases upon signing off of the articles "unless the seaman affirmatively establishes a custom or agreement to the contrary" (Pet.'s Brief, p. 27). Though such burden did not rest upon the complaining seamen, it was nonetheless met.

Petitioner's formulation, however, is subject to serious objection. As we read the *Waterman* decision, this Court never intended to make the materiality of shipping articles a question of fact in every instance of a challenged discriminatory discharge.

Shipping articles from their earliest inception were designed to protect seamen against the license of a ship's officer and the exploitation of a crimp. They were not intended to define the entire employment relationship. The *Waterman* case, supra, at p. 212.

Moreover, the specific problem of whether articles could be construed as terminating employment could have had no real significance prior to the enactment of the National Labor Relations Act, because until that enactment employees had no legal recourse against an anti-union em-

ployer. Additional reasons support this conclusion. Sections 564 and 574 require the shipping articles to be signed only before "he (the master) *proceeds* on such voyage". No provision is made that the seaman sign articles upon the *commencement* of his employment. The fact, therefore, that a seaman was a member of a port crew or had begun to work, or even completed a voyage without signing articles, has been held not to deprive him of the benefits prescribed by maritime law. *The Falco*, 20 Fed. (2d) 363 (C. C. A. 2); *Jameson* v. *The Regulus*, 13 Fed Cas. No. 7198 (D. C., Pa.); *Kelly* v. *The Topsy*, 44 Fed. 631 (D. C., S. C.).

But the conditions which originally made necessary the protection afforded by shipping articles have been largely eliminated. The great majority of seamen today are hired through union hiring halls and wages and working conditions are covered by collective bargaining agreements between employers and unions. The equalization of the bargaining status of shipowners and seamen now depends upon the development of stable conditions of collective bargaining within the industry, not upon the limited individual protection secured through the signing of shipping articles. Not without reason, therefore, has the United States Maritime Commission recommended the abolition of the practice. It has been found that "Employment of seamen under shipping articles is archaic and is not consistent with modern personnel management". *Economic Survey of Coastwise and Intercoastal Shipping*, United States Maritime Commission, p. 27.

The position taken by the petitioner is therefore anomalous. It would utilize the outmoded protection of an ancient statute to deny seamen the benefits of modern legislation designed to protect them in a more progressive era. For if, as petitioner contends, there is no relationship of employment outside of the shipping articles, there is no place for collective bargaining in the maritime industry. Collective bargaining to be effective requires equality of bar-

gaining power. Such equality cannot be achieved or preserved if the employer may, at his uncontrolled option, reserve the employment status only for those whose views are acceptable to him. The legislative intent that collective bargaining shall serve as a means of "making collective agreements stabilizing employment relations for a period of time * * *" (H. Rept. No. 1147, 74th Cong., 1st Sess.), would therefore be impossible to achieve if employee tenure could be terminated at the end of any voyage.

But if shipping articles can have no bearing on the question of a seaman's employment, neither should it be necessary for the Board in every instance to take testimony as to whether a crew "had * * * a continuing tenure or relationship entitling them to re-sign" at the termination of a voyage. *Waterman* case, *supra,* at pp. 212-213.

The Act provides that an employer cannot terminate his employee's "tenure of employment or any term or condition of employment" because of union activity or affiliation (Sec. 8 (3)). In construing this legislative mandate, this Court recognized that "For the purpose of the Act, it is immaterial that employment is at will and terminable at any time by either party". *Ibid.*, at p. 219. If this be true, the presence or absence of shipping articles, or of proof of custom as to the re-signing of articles, becomes entirely irrelevant. In the first place, it is generally recognized and the Court so noted in the *Waterman* case, that in industry generally employees are customarily continued in their employment despite the limited contractual period of their employment; and that in the maritime industry it is a customary practice for shippers to re-sign their crews. *Ibid.*, at pp. 218-219. To require this inevitably available proof in every instance of a disputed discharge is therefore both unrealistic and unnecessary. But let us assume the exceptional and undoubtedly non-existent case where the employer does not make it a practice to re-sign the original crew. Let us assume further that the petitioner herein was exactly that kind of an employer. Upon the facts here presented, it

is submitted, that the Board would have had no alternative but to reach the same conclusions. For the evidence is undisputed and petitioner concedes that the only reason why it discharged the five men was because of their strike action.[21] That being the motive, it can make not the slightest difference that the employer ordinarily might have refused to re-employ them. Union activity, however, may lawfully play *no part* in discharging employees. *Kansas City Power and Light Co.* v. *National Labor Relations Board*, 111 Fed. (2d) 340, 349. "The employer may not, under cover of that right (to select the employees or to discharge them), intimidate or coerce its employees with respect to their self-organization." *National Labor Relations Board* v. *Jones and Loughlin S. Corp.*, 301 U. S. 1, 45.

Therefore, to remove whatever doubts may still exist, it is respectfully submitted that the Court adopt the following principle: **Where, by substantial evidence it is found that a seaman was discharged because of his union activities or affiliation, the employer shall be guilty of an unfair labor practice within the meaning of Sec. 8 (1) and (3); and it shall constitute no defense to such finding that (a) the seaman first signed off the shipping articles prior to being discharged or (b) that no evidence was offered to show that the employer had adopted the custom of re-signing his crew upon the termination of a voyage.**

But even if, contrary to the evidence, and in violation of the principle above set forth, it were to be assumed that the men had ceased to be employees, the petitioner's refusal to re-sign them because of their strike activity nevertheless also would have constituted a violation of Sec. 8 (1) and (3) of the Act (R. 28). The Act proscribes

(21) Petitioner has apparently abandoned the contention urged before the Board and Circuit Court that there were other and additional reasons unrelated to the strike for terminating employment of the five strikers (R. 32-37; Pet.'s Brief in the Circuit Court, pp. 29-34; Bd.'s Brief in the Circuit Court, pp. 21-22, 32-37). The existence of additional reasons, even if conceded, would be immaterial for Union activity may lawfully play *no part* in discharging employees. The Act is valid where at least one purpose and the "real motive" for discharge is Union activity. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 132, 57 S. Ct. 650-655.

"discrimination in regard to *hiring*" as well as "*tenure of employment*" (Sec. 8 (3)). "Experience having demonstrated that discrimination in hiring is twin to discrimination in firing, it would indeed be surprising if Congress gave a remedy for the one (reinstatement for discriminatory discharge) which it denied for the other." *Phelps Dodge Corp.* v. *National Labor Relations Board*, 313 U. S. 177, 187; see also *National Labor Relations Board*, v. *Mackay R. and Tel. Co.*, 304 U. S. 333, 346, 347; *National Labor Relations Board* v. *Waumbec Mills, Inc.*, 114 Fed. (2) 226 (C. C. A. 1).[22]

III

Peaceful strike action of seamen on board a vessel moored to the dock in a safe port to induce their employer to cease an unfair labor practice is lawful. The discharge of seamen because of such action is a further unfair labor practice within the meaning of Section 8 (1) and (3) of the Act.

Reduced to its ultimate implications, it is petitioner's contention that notwithstanding the National Labor Relations Act, no seamen may engage in a strike anywhere but

(22) In the *Waumbec* case, supra, the Court stated at page 233: "The refusal to employ an applicant because he has been an active union official must certainly be regarded as a 'discrimination in regard to hire' within the natural meaning of those words, a meaning which coincides so faithfully with the declared policy of the Act that there can be no justification to reach for a strained construction. An offer of employment only on condition that the applicant will not join a union or will refrain from union activity, is without doubt a violation of Section 8(3) as a 'discrimination in regard to * * * any term or condition of employment.' It would be a most extraordinary result if the Act prohibits this milder conduct by an employer and yet permits him to deny employment unconditionally because of an applicant's former union activity. If employers are free to pursue a policy of blacklisting applicants with labor union records, then the other prohibitions of the Act are of little worth. Such a manifestation of anti-union bias on the part of an employer necessarily casts a coercive shadow upon his employees, tending to inhibit the free exercise of their right of self-organization and to deprive the employees of potential leaders. Furthermore, the exercise by employees of their right to self-organization would inevitably be restrained by the contemplation that if for any reason they should lose their present jobs they might freely be discriminated against, in seeking other employment, because of their record of union activity."

the home port without committing a felony, and not even in the home port without thereby forfeiting his employment. This follows from the petitioner's insistence that a strike during the course of a voyage is mutinous and that employment automatically terminates at the end of an articled voyage. In effect, therefore, petitioner would deny seamen the right to strike altogether if by such right is understood the concerted cessation of work without loss of employment to settle a labor dispute or an unfair labor practice. *National Labor Relations Board* v. *Mackay Radio and Telegraph Co.*, 304 U. S. 333, 346.

That an employer may not utilize the signing off of articles to discriminate against his employees because of their union affiliation or collective activity is discussed supra, Point II. We turn now to the second erroneous concept urged upon the Court. Petitioner argues that notwithstanding the provocation of a strike because of the employer's violation of the Act and the peaceful manner in which the strike is conducted while the vessel is moored safely to dock in a safe port, such strike is nevertheless unlawful because of its occurrence in an intermediate port of call, rather than in the home port.

The argument rests upon two premises: first, the essential difference between land and water employment and the paramount importance at sea of discipline and unquestioned obedience to the master's command; second, the impairment of such discipline and consequent danger to ship and cargo upon concerted action of the crew in disobedience to command prior to the termination of the voyage regardless of where such disobedience occurs, at sea or in port.

The first premise is not disputed. The National Maritime Union of America, like organized maritime labor generally, has recognized the necessity of unique and even extraordinary measures for the maintenance of safety on the high seas. It would no more condone the action of its members which jeopardizes life or property either at sea or ashore than would any other responsible trade union. This does not mean, however, that within these limits the

right to strike has been relinquished. Where the exigencies of war and the threat to national security have required ceaseless production and uninterrupted transportation of goods, organized labor as a whole, including every division of maritime labor, voluntarily surrendered the exercise of economic sanctions for the duration of the emergency. Today thousands of organized seamen are at their stations on our merchant fleet which is as yet inadequately armed and insufficiently convoyed. So far as is known, casualties in the merchant marine from mines, torpedoes and bombs may at this point exceed even those of the Navy. No whimper has come from the seamen nor complaint from the Unions.

The issue therefore is not the right to strike on the high seas or the right to strike during the war period. The sole issue before this Court is the right of seamen in periods of normalcy to withhold their services where such withholding endangers neither ship, cargo, passengers, officers or crew because the ship is then at dock and in a safe port.

If as shall be shown the continued safety of a vessel is the only recognized limitation on the right of seamen to strike, it is important that the action of the crew of the *City of Fort Worth* on July 18, 1938, be reviewed.

A. The conduct of the strike which the petitioner claims as justification for the discharge of five out of the thirteen strikers was lawful concerted activity.

The original and chronological history of the strike is set forth supra, pp. 7-10. Cited here are only the salient and undisputed facts as to the condition of the vessel and activities of the strikers during the course of the 11-hour strike.

The *City of Fort Worth* docked at Houston, Texas, on July 14, 1938, with a crew of 27 seamen including 19 unlicensed personnel for the purpose of discharging the cargo brought from Philadelphia and to take on new cargo for the return trip (R. 142, 232, 432, 683). The ship was moored or "tied up against the dock" affording passage

directly from the ship to the dock (R. 128, 137, 269). Between July 14th and July 18th, when the vessel resumed its voyage, the crew stood eight-hour port watch and slept on board the same as if at sea, except that the men could then spend their leisure ashore as well as in their bunk rooms and on the poop deck (R. 222, 239, 269, 452, 513). The port duties of the five discharged men were as follows: Smith, mess boy, had the same duties as at sea, waiting on the men at meals, washing dishes, cleaning cabins and making beds (R. 204-207, 407-409, 423, 427, 683). Tracey and Ferguson, firemen and oilers, stood two four-hour watches daily and provided the steam necessary for the operation of the winches used in loading cargo and for the sanitary and safety appliances, such as fire alarms, ice-machines and sanitary pumps. They also greased and oiled machinery (R. 122, 131-132, 134, 177, 181-182, 352, 479-480, 683). Pfuhl and Warren, able seamen, painted the sides of the ship and smokestacks, cleaned the pilot house and did odd jobs (R. 213, 269, 272, 280, 683). The actual loading and unloading of the cargo was done by stevedores (R. 132, 142, 269-270).

On Sunday, July 17th, when the union members of the crew learned that the petitioner refused to recognize the six months old certification of the Union and had declined to bargain collectively with it, they decided to call a strike the next day (R. 128-131, 179-181, 593-596). It was agreed that steam would not be supplied for operating the winches but that sufficient steam would be maintained at all times to operate all of the ship's sanitary and safety devices (R. 130-131, 595-596).

On Monday, July 18th, at 8 A. M., the strike began when Tracey, Union delegate for the engine room failed to turn the steam "on deck" for the purpose of loading cargo (R. 126, 128, 131-132, 180-181, 197, 219). When Pool, first assistant engineer, turned the steam on himself, Tracey, in accordance with prior notice, called on Braun, the fireman on duty, to join the strike, which he did (R. 132-133). At this point, Ferguson relieved Braun, whose watch had just

terminated (R. 134). Ferguson refused to fire, but remained present "to see that the steam wouldn't get too low, that the auxiliary wouldn't stop" (R. 182). Ferguson and Tracey did not leave the fire until Robinson, second assistant engineer, told Ferguson "Go on up. I will take care of things down here", and assured both of them that he would be responsible for maintaining the steam for the safety and sanitary devices. They then rejoined the eleven other strikers who were seated on the poop deck, the general place of meeting and recreation of the seamen when off duty (R. 134-137, 182, 270-272, 355-356, 380-382, 500). The ship's officers, together with the assistance of the six unlicensed seamen who did not participate in the strike, then proceeded with the necessary operations for the loading of cargo (R. 317-319, 355-356, 381-382). The strikers did not make the slightest attempt to interfere with any of the normal operations on shipboard performed by the officers and non-striking members of the crew (R. 290-292, 293, 323, 375, 387, 388, 404, 499-502). They merely sat on the poop deck (R. 135-137, 242, 290-291, 387-388, 500, 501-502).

Chief mate Helland and later Captain Rudan went to the poop deck to inquire what was the trouble and was informed by Warren, Union delegate for the deck section, that the men were striking for Union recognition (R. 139, 165-166, 219-220, 268-272, 286-288, 433, 483). Helland told the men that he "wanted them to go over the side and paint and grease the gears, and he wanted them to get the pilot house cleaned up before sailing" (R. 272). Though the men were warned by Captain Rudan and thereafter by a Deputy United States Commissioner that their conduct was in violation of the ship's articles and that they were subject to being "logged", and were ordered individually and collectively to return to work, the men refused, persisted in their strike and throughout the day remained seated on the poop deck in an orderly manner (R. 137, 138, 165-166, 241-242, 273-274, 290-291, 375, 382-383, 387-388, 431-435, 437-440, 499-502, 681). At noontime, the mess boy,

Smith, resumed his duties. With the captain's permission, the entire crew, strikers and non-strikers, were served their midday meal and Smith did the serving in the dining room. After dinner, the strikers returned to the poop deck (R. 206-207, 423-424). At no time were the men ordered to leave the vessel (R. 325, 404, 513). At no time did their refusal to work in any way endanger the safety of the ship (R. 387).

Thereafter, following telephone calls to Philadelphia and conferences between the local attorneys for petitioner and Union, assurances were given by petitioner's attorney that if the strike were called off, he would meet with the Union during the following week in an effort to negotiate an agreement and also would recommend the issuance of passes to shore delegates to board petitioner's ships (R. 616, 642-643). Thereupon Captain Rudan gave the strikers permission to leave the ship for the purpose of conferring with their shore delegates on the dock and, relying upon the assurances given, the strike ended at 7 P. M., when the employees all went back to work (R. 142-149, 242-243, 274-275, 450-453, 489-490, 513, 620-621).

The loading of the cargo was not delayed by the strike and at 9 P. M. that night the ship sailed on schedule (R. 147-149, 275, 292-293, 483).

When the vessel docked at Philadelphia, on July 25, 1938, and the crew signed off their articles, five of the thirteen employees who engaged in the strike, namely, Warren, Union delegate of the deck department; Tracey, Union delegate of the engine department; Smith, Union delegate of the steward's department; Ferguson and Pfuhl were discharged because of their participation in the strike (R. 126-127, 151-155, 185-186, 195, 201-202, 223-225, 284, 289-290, 298, 338, 391, 394, 494, 520-521, 533, 534). There had been no complaint about those men on the return voyage and the entire crew, including the strikers, had performed their duties in a competent manner (R. 295-297, 299-377, 388, 502).

Upon these undisputed facts, the Court below upheld the Board's conclusion that (R. 773-800, 30):

> "The evidence affords no basis for finding that the conduct of the union members during the strike projected them outside the framework of protection afforded by the Act. We find that respondent was not warranted in discharging any of the union members solely because of their collective activities in striking."

Petitioner's assertion that the concerted activity of July 18th was unlawful rests entirely upon the assumption that seamen, unlike shore workers, are not protected by the Act in their right to strike. Unless the alleged distinction is sound, thereby making the conduct of the strike immaterial, there can be no question but that the strike was conducted in all respects in a lawful and proper manner. This is implicitly admitted by petitioner for it is conceded:

a) "No damage was occasioned" by the strike (Pet.'s Brief, p. 15).

b) "The ship was not in any danger at any time" was expressly stated by the chief engineer at the hearing (R. 387).

c) When asked as to whether the men took possession of the ship, both the captain and the chief engineer categorically answered "No" (R. 404, 500).

d) Nor could any of the ship's officers deny that the strikers had made not the slightest attempt to interfere with any of the operations on shipboard performed by the officers, the non-striking members of the crew, or the stevedores during the course of the strike (R. 290-292, 293, 323, 375, 387-388, 404, 499, 501-502).

e) Neither the loading of the cargo nor the sailing of the vessel was in any way delayed by the action of the men (R. 293, 483).

f) The conduct of the strike was peaceable. All that the men did was merely to sit on the poop deck, their usual place of meeting and recreation (Pet.'s Brief, p. 14; R. 135-137, 241-242, 290-291, 387-388, 500-502).

g) The men were at no time ordered to leave the ship. Nor were they at any time considered trespassers (R. 325, 404, 513) for it was admitted that unlike an industrial plant, a ship is also the living quarters of its crew, both in and out of port (R. 325, 326, 405). Moreover, despite their inactivity, it was admitted that their presence afforded the ship greater protection than if they had left the ship (R. 30; footnote 22).

Absent therefore the distinguishing facts of *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U. S. 240, the conduct of the men cannot be said to have placed them outside the protection of the Act.

As stated in *National Labor Relations Board* v. *American Manufacturing Co.*, 106 Fed. (2d) 61, 68 (C. C. A. 2), aff'd 309 U. S. 629:

> "We do not regard the action of these or other employees in standing around the premises for a period of not more than two hours, while an attempt was being made to persuade the Company to fix a date for collective bargaining with T.W.O.C., as in the nature of a sit-down strike which would permit the termination of the employee relationship. They certainly were not claiming to hold the premises in defiance of the right of possession of the owner and we regard the case as no different from that of an ordinary strike where work has ceased because of an unfair labor practice."

See also, *National Labor Relations Board* v. *Stackpole Carbon Co.*, 105 Fed. (2d) 167, 176 (C. C. A. 3), cert. den. 308 U. S. 605; *Black Diamond S.S. Co.* v. *National Labor Relations Board*, 94 Fed. (2d) 875 (C. C. A. 2), cert. den. 304 U. S. 579.

The erroneous conclusion that seamen have no right to strike except in the home port, when the convenience of the employer has been fully served, is derived by the petitioner from the admitted necessity of discipline and obedience when the ship is upon the high seas or in an unsafe

port. Therefrom petitioner draws the further but unwarranted inference that no strike is permissible, regardless of the safety of the vessel or the peaceful manner in which, or legitimate purpose for which the strike is conducted, because such strike must inevitably impair the authority of the master and future discipline at sea.

The deduction is untenable. Whatever differences may distinguish water from land employment necessarily disappear when the sea-hazard ceases. The "perilous voyage amidst storm-swept seas" may justify the temporary surrender of a seaman's liberty. But when the sea loses its peril in the protected harbor of a safe port and the ship is securely moored to the dock, seamen resume the right guaranteed to all workers to exercise their economic strength for the protection and improvement of their mutual welfare.

Similarly erroneous is the conclusion that disobedience in port may jeopardize future discipline at sea. The same argument could be made by any traction, transit or factory employer. Whenever employees during a labor dispute or because of unfair labor practices cease work in order to strike, they necessarily neither obey orders nor perform their normal duties. They are nevertheless exercising a paramount right expressly guaranteed by Sections 7 and 13 of the Act. For experience has shown that industrial harmony is possible only where organized labor retains the right to employ economic sanctions. Without such power, the right to bargain collectively becomes meaningless.

Petitioner invokes the Mutiny statute and the decisions thereunder to support its thesis that seamen have no right to strike either at sea or in port. Unfortunately, for the petitioner, neither the legislative history nor the judicial interpretation of these ancient laws support the desired proposition. Aside from the fact that these statutes arose in an era when labor had no right either to organize or to strike and when trade unions were illegal combinations, and they were therefore never intended to apply to modern

problems of industrial relations, it is, moreover, certain that contemporary legislative policy guarantees to seamen the same rights as those enjoyed by land workers when, as here, those rights are exercised in a safe port.

(a) *The History of the Federal Mutiny and Revolt Statutes.*

The first mutiny statutes in the United States, enacted in 1790, were patterned after the English law, which was originally intended to suppress piracy.[23] The Crimes Act of 1790 provided death as "a pirate and felon" for anyone making a revolt,[24] and three years' imprisonment or a fine of $1,000 for attempting to make a revolt.[25] In 1835 the law was revised, the death penalty removed, and mutinous conduct defined in more detail.[26] Except for reenactment in 1909, with only minor changes,[27] the 1835 laws have remained virtually unchanged to the present day, and now constitute Sections 292 and 293 of the Criminal Code.[28]

Section 293 makes it a crime, punishable by a fine of not more than $2,000 and imprisonment of not more than 10 years, for a member of the crew of any American vessel (a) to usurp command of the vessel or deprive the master of authority and command on board; (b) to resist or prevent the master "in the free and lawful exercise of his authority and command" on board; or (c) to transfer such authority and command to another not lawfully entitled thereto.

Section 292 makes it a crime, punishable by a fine of $1,000 and imprisonment for 5 years, to incite revolt or mutiny on shipboard, and defines the acts constituting the crime in general terms, as follows:

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(23) 11 and 12 Will. III, c. 7, Sec. 8 (1698-9).
(24) Act 1790, c. 9, Sec. 8; 1 Stat. 113.
(25) Act 1790, c. 9, Sec. 12; 1 Stat. 115.
(26) Act 1835, 4 Stat. 776.
(27) Act 1909, c. 321, Secs. 292, 293, 35 Stat. 1145.
(28) 18 U. S. C. A., Secs. 483, 484; see Appendix, infra, pp. 54-55.

> "* * * endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof, or unlawfully confines the master or other commanding officer thereof * * *."

The Crimes Act of 1790, unlike its successor in 1835, did not define the nature of the offense involved in "shall make a revolt in the ship" and "endeavor to make a revolt in such ship". The definition was supplied in 1826, *United States* v. *Kelly*, 11 Wheat. (24 U. S.) 417, where Mr. Justice Washington declared:

> "This Court is of opinion that although the act of Congress does not define this offense, it is nevertheless competent to the Court to give a judicial definition of it. We think that the offense consists in the endeavor of the crew of a vessel, or any one or more of them, to overthrow the legitimate authority of her commander, with intent to remove him from his command, or against his will to take possession of the vessel by assuming the government and navigation of her, or by transferring their obedience from the lawful commander to some other person."

The Act of 1835, which supplied the statutory definition, quoted above, was passed only after assurance was given by Senator Clayton, author of the bill, that it "was only designed to apply to conspiracies by the crew to neglect their duties, so as to endanger the safety of the ship and crew".[29]

Measured against this legislative and judicial background, it seems hardly likely that seamen would be guilty of mutiny where their refusal to paint, clean bunks, or turn on steam in no way threatened the safety of the vessel.

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(29) Congressional Globe, Vol. 2, p. 265, 23d Cong., 2d Sess., Feb. 19, 1835.

(b) *Judicial Construction of the Statutes*

The cases cited by petitioner do not support the desired conclusion that concerted activity by seamen in a safe port, which does not endanger the ship and which is provoked by the employer's violation of a statutory duty, may, nevertheless, constitute mutiny. They held merely that mutiny may occur in port as well as on the high seas, a proposition disputed neither by the Board nor by the Union. The cases are distinguishable, moreover, on their facts and by their vintage.[30]

Except for three cases discussed infra, none of the cases cited by the petitioner involved a conviction for action committed in a harbor of the United States. The illegal conduct occurred either on the high seas, in an unsafe harbor, or in a foreign port. It involved either physical assault upon officers of the vessel, or an unwarranted attempt to interfere with the navigation of the vessel through the refusal to accept a substitute master.[31] In no case was the conduct of the employer found unlawful.[32]

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(30) Pet.'s Brief, pp. 16-17, footnote 16.

(31) *U. S.* v. *Smith*, 27 Fed. Cas. No. 16344 (C. C., D. Pa., 1811)—Captain assaulted by crew while vessel in foreign river, St. Ubes, Portugal; escaped ship to save life. Command restored only after soldiers disarmed crew.

U. S. v. *Roberts*, 27 Fed. Cas. No. 16173 (C. C., S. D. N. Y., 1843)—Riot on board vessel docked at Havre, France, during attempted theft of specie.

U. S. v. *Petersen*, 27 Fed. Cas. No. 16037 (C. C., D. Mass., 1846)—Captain and mates assaulted with dangerous weapons while ship was on high seas between New Orleans and Boston.

U. S. v. *Seaarist*, 27 Fed. Cas. No. 16245 (C. C., S. D. N. Y., 1860)—Attempted revolt, facts not disclosed, while vessel lay in harbor of Palermo, Sicily, "outside low watermark on the coast", fastened to shore by cables.

U. S. v. *Keefe*, 26 Fed. Cas. No. 15509 (C. C., D. Mass., 1824)—Attempt to commit revolt in a foreign port. Neither name of port nor facts disclosed.

U. S. v. *Cassedy*, 25 Fed. Cas. No. 14745 (C. C., D. Mass., 1837)—Refusal to continue whaling voyage to Pacific from St. Helena under chief mate replacing ill master.

(32) *U. S.* v. *Staly*, 27 Fed. Cas. No. 16374 (C. C., D. R. I., 1846), cited by petitioner, involved the issue of a seaman's justifiable refusal to sail on an unseaworthy vessel. No conviction resulted.

Cf. *U. S.* v. *Ashton*, 24 Fed. Cas. No. 14470 (C. C., D. Mass., 1834), where the crew refused to continue voyage during a gale on a leaky ship and compelled the master to put back to port. The indictment was nolle prossed after Justice Story made the following observation at page 874:

> "The relation between master and seamen is created by contract; but that relation, when created, is governed by the general principles of law. Unlimited submission does not belong to that relation. I have great repugnance to creating constructive offenses, and especially where there is perfect integrity of intention."

The three cases in which seamen were convicted on account of acts committed in a domestic port, arose under the Crimes Act of 1790 and were decided by Justice Story between 1818 and 1829. *U. S.* v. *Hamilton*, 26 Fed. Cas. No. 15291 (C. C., D. Mass., 1818), and *U. S.* v. *Haines*, 26 Fed. Cas. No. 15275 (C. C., D. Mass., 1829), involved similar facts. The vessels had put back to port because of the illness of the master and the crews refused to resume the voyage under a new one. In both cases it was contended that the relationship of seamen to master was personal and that employment terminated with a change of masters. In *U. S.* v. *Gardner*, 25 Fed. Cas. No. 15188 (C. C., D. Mass., 1829), the crew refused to set sail unless "they should have a day watch below during the whole voyage". In these three cases the Court held the demands unjustified by law and found the defendants guilty of an "endeavor to make revolt".

Considered in the light of their historical background, these decisions cannot be said to represent the current trend of authority. They arose in an era when the status of a seaman differed little from that of a Negro slave, when both were subject to involuntary servitude and desertion or refusal to work were crimes punishable by capture and imprisonment.[33] This is reflected in the decisions by the uniform attempts of the defendants to free themselves from employment and their conviction only after "obstinate" refusal to resume their work upon assurances given both by the employer and the Court that their conduct would be "forgiven and forgotten".[34]

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(33) In fact, the Negro received his emancipation much earlier than the seaman. In 1897 the Supreme Court held that the Thirteenth Amendment was not intended to apply to maritime labor (*Robertson* v. *Baldwin*, 165 U. S. 275).

(34) "It became necessary, at last, to seek the interposition of a civil officer to arrest some of the leaders; and when he came on board a scene of great confusion ensued, in which the seamen acted together, and opposed with force every attempt to arrest any of them, or to reduce them to obedience; and the officers were obliged to protect themselves by resorting to their muskets and other weapons. Two of the defendants were among the principal ringleaders; and after a considerable struggle they were carried to

Of significance also is the essential difference in the nature of the demands which were made the basis of concerted action in the cited cases and in the case at bar. In the *Hamilton*, *Haines* and *Gardner* cases no violation of law was entailed in refusing to grant a "day watch below" or in refusing to release the crew of its contractual obligation because of the master's disability. Here petitioner's refusal to bargain collectively with the Union was defiance of law and constituted interference with rights guaranteed seamen under the Act. How markedly dissimilar are the two periods under comparison is perhaps best indicated by the sharp reversal of the seaman's attitude towards his employment. The emphasis today is not upon the right to cease employment because of unsatisfactory working conditions but rather upon the right to continue and improve the relationship through collective bargaining on terms of equality with the employer. The change can be explained only by the presence now and the absence then of maritime trade unions and the recognition of labor's right to self-organization and the use of its economic strength when necessary.

It is interesting to note that within a decade after the *Hamilton*, *Haines* and *Gardner* decisions, two different courts took cognizance of the distinction between disobedience at sea and in port.

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prison. On the next day two of the defendants offered to return on board the ship but * * * the other * * * remained obstinate in his refusal" (*U. S.* v. *Hamilton*, supra, at pp. 93-94).

"The defendants were then carried on shore, and being apprehended on a warrant, were brought before the district judge, who upon the examination explained the law to them, and urged their return to duty. But they refused, and were committed for trial. The owners, upon the examination, expressed an entire willingness to take them on board again, and to forgive and forget the past, if they would go upon the voyage, but these offers had no effect" (*U. S.* v. *Haines*, supra, at p. 63).

"Application then was made for a warrant to arrest them, and they were taken on shore under it, and upon a hearing before the District Judge, he explained the law to the seamen, and urged them to go on board again, and the owners agreed, if they would go on board and perform duty, this offense should be forgiven and forgotten. The defendants refused, and were then committed for trial" (*U. S.* v. *Gardner*, supra, at p. 1258).

In *The Blake*, 1 W. Rob. 73, 166 Eng. Rep. 500, 506 (1839), which involved the refusal of a crew to work while a vessel was in port, the Court declared:

> "It is also to be observed, that the occurrence took place in port, where the ship was exposed to no hazard; and I draw a strong line of distinction between disobedience of orders in port, and any insubordination whatever when the vessel is on the high seas, when it might expose to destruction, the ship, cargo and lives of all on board."

In *Buddington* v. *Smith*, 13 Conn. 334, 335-336 (1839), where the Court allowed a seaman damages for unlawful imprisonment while the ship was in port, the Court stated:

> "The mariners of a ship at sea are at a distance from all the ordinary restraints of Government, and, of course, must be subjected to other rules of discipline than those who are under more immediate accountability to law. The master, therefore, is invested with absolute authority; or at least, a power as great as that of a master over his apprentices, or a parent over his child. His orders, when not unlawful, must be obeyed; * * * But when the ship is in port there is much less necessity for the exercise of this authority." [35]

The petitioner has cited only three cases of convictions under Section 292 of the Criminal Code arising in the Twentieth Century. *Hamilton* v. *U. S.*, 268 Fed. 15 (C. C. A. 4), cert. den. 254 U. S. 645; *Rees* v. *U. S.*, 95 Fed. (2d) 784 (C. C. A. 4); *U. S.* v. *Albers*, 115 Fed. (2d) 833 (C. C. A. 2). These cases are also distinguishable on their facts. In none of them did the action of the crew occur in an American port. In none was the employer guilty of any violation of duty. No case involved the employer's obligation to bargain collectively with his employees. In two of the

(35) Cf. "The relations between master and man require an authority which is not necessary when both parties have immediate recourse to constituted authority" (*The Condor*, 196 Fed. 71, 74 [1912]).

three cases the refusal of the men to work was the result of an erroneous belief, based on a misconstruction of the statute, that they were entitled to discharge or immediate payment of their wages in a foreign port. In each case the refusal to work occurred under conditions which could be construed as dangerous to the vessel.

In *Hamilton* v. *U. S.*, supra, the merchant ship "Poughkeepsie", while returning to New York, lost three propellor blades in succession and, in response to a wireless call for assistance, was towed for repairs to Granaway's Deep, which is about three miles from Hamilton, Bermuda, but is considered part of the Hamilton harbor. Before the repairs had been completed, the six months term, for which the crew had signed up, expired. The crew, unaware of the law that seamen are not entitled to be discharged until a port of safety is reached, even though their articles of shipping have expired, if the fault does not lie with the master or the owners of the ship,[36] demanded their discharge with wages due them and free transportation to New York. The captain refused and the crew declined to work. Another crew was obtained and the original crew was confined in the hold during the return voyage. Upon these facts the men were found guilty of inciting mutiny. The indictment charged that the offense had been committed on the high seas[37] and the master testified that the ship was not at a dock and that Granaway's Deep "was in no sense landlocked."[38] Aside, therefore, from the question of the ship's position in a safe port, the decision can be justified upon the additional ground that the seamen in effect abandoned the vessel while in distress in a port of refuge.

(36) *Fairchild* v. *The Aurelius*, 8 Fed. Cas. No. 4609, p. 953 (D. Mass., 1841).

(37) Transcript of record filed April 14, 1920, in the Circuit Court of Appeals for the Fourth Circuit, No. 1816, pp. 2-3.

(38) Ibid., p. 11; *Hamilton* v. *U. S.*, supra, at p. 27.

In *Rees* v. *U. S.*, supra, the S. S. "Algic", owned by the U. S. Maritime Commission and operated by an agent, anchored in the harbor of Montevideo, Uruguay, about three-quarters of a mile from the dock, on its homeward voyage. While so anchored, the crew engaged in a sympathy strike on the assumption that the stevedores loading the ship were strikebreakers. During the course of the strike it became necessary to shift the anchorage, which the men refused to do. Upon these facts the crew was found guilty of mutiny. The Court found it unnecessary to pass on the question here presented because it found that the action of the crew had occurred in an unsafe port and that the vessel was thereby endangered.

> "The defendants contend that the crew of a vessel which is moored to a dock or is at anchor in a safe harbor have the right to strike and that the Mutiny Act, 18 U. S. C. A. Sec. 483, has no application to seamen in such a situation. But that question is not presented for decision in this case. As we have already pointed out, the Algic was not in fact moored to the dock or at anchor in a safe harbor, but was in such a position that the obedience of the crew to the orders of the master was essential to her safety. In such a case, the same rule is applicable as though the vessel were at sea, as this court decided in Hamilton v. United States, 4 Cir., 268 F. 15" (p. 792).

In *U. S.* v. *Albers,* supra, the crew of the S. S. "Ewa" refused to continue working because of the captain's refusal, later retracted, to give them an advance on their wages while the ship was at anchorage in the port of Colombo, Island of Ceylon. Claiming that their statutory rights had been violated,[39] the crew notified the master that they considered their articles broken and demanded their full pay. The demand was refused and no work was done from March 4th to March 15th, although the men were ordered to set sail on March 12th. Upon consular advice the vessel was taken to Aden, and from Aden to Port Said.

(39) 46 U. S. C. A., Sec. 597.

At Port Said the men were paid off and the ship sailed home with a new crew.

The decision holding the men guilty of mutiny can be understood only in the light of the facts presented. Although the Court found that the statute, entitling the men to a draw of half of their pay when in port, was not violated, it is clear from the tenor of the opinion that the decision would have been the other way if, as here, the violation of the employer's duty had been established.

Mutiny entails a forfeiture of wages.[40] If, therefore, as petitioner contends, a strike in a safe port where the vessel is securely moored constitutes mutiny, it would follow that suits brought by seamen to recover wages withheld because of such strike activity should result in no recovery. Precisely the reverse is true. Where peaceful strikes have occurred, without danger to the ship, wages so withheld have been recovered. Wages have been recovered even where the strike action took place in an unsafe port, where the Court found "the peril not * * * great nor the danger imminent.[41]

In *Weisthoff* v. *American-Hawaiian S. S. Co.*, 79 Fed. (2d) 124, C. C. A. 2, Cert. Den. 296 U. S. 619 (1936), the crew signed on the S. S. "Texan" at San Francisco for a voyage to Gulf and Atlantic ports and return. During the voyage watches were broken and the men required to work overtime without pay, contrary to the statutory regulations.[42] While the vessel was in New York, moored to a dock in the harbor, the entire deck crew and that of the engine room prepared a list of demands which were presented to the master. These demands did not directly refer to the master's violation of statutory regulations but did include requests for division into watches and a demand

(40) *The Mentor*, 17 Fed. Cas. No. 9427, p. 15 (C. C., D. Mass., 1825); *The Shawnee*, 45 Fed. 769 (D. C., E. D. Wis.).

(41) *The Dona Lane*, 299 Fed. 977, 980 (D. C., W. D. Wash., S. D., 1924). See also *Johnson* v. *Cyane*, 13 Fed. Cas. No. 7381 (D. C. Cal., 1870); *The Richard Matt*, 20 Fed. Cas. No. 11766 (D. C., N. D. Ill., 1864).

(42) 46 U. S. C. A., Sec. 673.

for overtime. The crew refused to work until all these demands had been satisfied and refused to leave the ship until the police were summoned to come aboard. The crew then left but the demand for their wages was evaded by the master who stated that he had no money at the time to pay them. The "Texan", after some delay due to the strike, subsequently sailed with a new crew.

A suit by the members of the striking crew to recover their wages was met with the contention by the steamship company that under the *Hamilton* case [43] the conduct of the crew constituted mutiny and that the crew had, therefore, forfeited their wages. The Court dismissed the contention and found that the statutory requirements had been violated by the Company. It declared:

> "The allegations that they attempted to make a revolt and deserted so as to forfeit their wages under 46 U. S. C. A. Sec. 701 were not sustained in the District Court, and we do not find more than the making of demands, some of which were ill-advised and called for action they should have known the master could not take, instead of putting their case to him on tenable statutory grounds which entitled them to their discharge and pay. It was rather a case of poor judgment and misunderstanding of their rights than the gross misconduct which will forfeit wages. Compare The Mentor, 17 Fed. Cas. 15, No. 9,427. Accordingly, as we accept the findings as to the character of their conduct, we agree that they are entitled to wages earned."

The decision is, therefore, clear authority for the proposition that a crew may strike in a port of safety, though it be a port of call, where statutory regulations have been violated.

A similar conclusion had been previously reached in *The Sunderborg*, 47 Fed. (2d) 723 (C. C. A. 4). In this case a crew of foreign seamen struck while the vessel was docked in the port of Halifax because of an erroneous belief that

(43) Supra, at p. 33.

the itinerary of the vessel included a trip to Europe. The master thereupon had them arrested and placed in jail, charged with mutiny. The Halifax Court dismissed the charge and the vessel resumed its voyage upon instructions to return directly to the United States. Upon the ship's arrival at Norfolk the master withheld a part of the wages as damages occasioned by the crew's refusal to work during the strike. The Court found that the strike was unjustified but nevertheless allowed recovery because of the clear violation of the statutory requirement that wages be paid within four days after the seamen have been discharged.[44]

(c) *The Equalization of Status for Maritime and Land Labor through Congressional Enactment.*

The legislative policy of the United States for the past half century refutes petitioner's contention of separate and limited status for seamen. The feudal period for maritime labor ended in 1898 with the passage of the White Act.[45] Since then, with the adoption of the LaFollette Act in 1915,[46] the National Labor Relations Act in 1935,[47] and the amendments in 1938 to the Merchant Marine Act of 1936,[48] Congress has indicated a clear intention to draw no distinction between maritime and shore labor and to accord both an equality of rights.

Up to 1898 the statutes of this country provided that a deserting seaman might be apprehended by the shore authorities and lodged in jail until the vessel sailed, when he would be delivered to the ship and compelled to complete the voyage.[49] The Thirteenth Amendment abolishing slavery and involuntary servitude had been held inappli-

(44) 46 U. S. C. A. 596.

(45) 30 Stat. 760, 46 U. S. C. A., Sec 701 (1926).

(46) 38 Stat. 1164 (1915), 46 U. S. C. A., Secs. 541-713 (1926).

(47) 49 Stat. 449, 29 U. S. C. A., Sec. 151 et seq.

(48) 52 Stat. 965, 46 U. S. C. A., Sec. 1231 et seq., amending the Merchant Marine Act, 52 Stat. 953, 46 U. S. C. A., Sec. 1112, by adding Chapter X, entitled "Maritime Labor Relations".

(49) R. S., Sec. 4598.

cable.[50] That year an aroused public opinion compelled the passage of the White Act, abolishing imprisonment for breach of articles. Deficiencies in the legislation were later corrected with the adoption of the LaFollette Act of 1915, but not until both the Republican and Democratic National Platforms of 1912 had urged the repeal of all laws and the abrogation of such treaties as provided for imprisonment of seamen charged with desertion or with violation of their contract of service.[51] The published reports and debates on these measures repeat a single theme: The restoration of equal treatment for seamen and shore workers alike.

> "* * * it (the bill) proceeds upon the principle that the sailors in our Merchant Marine service should, in their personal rights, be placed upon an equality with American citizens engaged in other industrial pursuits" (Cong. Rec., vol. 28, pt. 7, 54th Cong., 1st Sess., p. 6288, June 8, 1896).

> "There is no other class of contracts, agreements or engagements where imprisonment is the punishment for a violation of their provisions; and the Committee thought after due care and deliberation, that no such punishment ought to be inflicted; that no punishment looking to imprisonment should be inflicted for a violation of a contract. It is claimed, on the other hand, that it is very important that the seaman should fill his engagement in order that the vessel might leave her port at the appointed hour. So it is important that a railroad train should start out of a depot, in order that that train may take its time and meet its engagements; and yet it has never occurred to any American legislator to try to put it into the law that a man who violated his contract with a railroad company should be liable to imprisonment for such violation, although his violation prevented the railroad train from starting out of the depot. So the Committee have stricken out of this bill every vestige of imprisonment for violation of a civil contract" (Cong. Rec., vol. 28, pt. 7, 54th Cong., 1st Sess., p. 6286, June 8, 1896).[52]

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(50) See footnote 33, supra.

(51) House of Representatives Report No. 852, 63rd Cong., 2nd Sess., Welfare of American Seamen, p. 25.

It is petitioner's major premise that seamen, by their calling, are a class set apart from other workers. From this it draws the conclusion that unlike the case of shore workers, concerted action by seamen is mutinous in character, if not in fact. Neither the premise nor the conclusion can be reconciled with the legislative purpose manifested in the White and LaFollette Acts to delete from the law "the master's power to compel obedience of seamen in port."[53] Their acceptance would entail not only the revival of a class distinction, now outlawed by Congress, but it would also permit the illogical conclusion that whereas in port a seaman may lawfully cease his work as an individual, he may not do so in concert with others.

Any question as to the unity of rights enjoyed by all labor is removed by Sections 1, 2 (2) and (3), 7 and 13 of the National Labor Relations Act.[54] The specific exclusion of Government employees and railroad, agricultural and domestic workers (Section 2 (2) and (3), cannot be reconciled with the alleged Congressional intent to exclude seamen. The Act, read in its entirety, leaves no doubt that it was designed to protect all workers except those specifically enumerated.

This conclusion is fortified by the 1938 amendments to the Merchant Marine Act of 1936. Designed to supply unions and ship operators with the machinery for voluntary mediation and arbitration, it reiterated for the waterborne industry the same national policy enunciated for industry and labor generally. It provides, moreover, that it shall in no way be construed to limit the applicability of the National Labor Relations Act.

"Sec. 1251. *Declaration of policy.*

It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial

(52) The reasoning is equally applicable as a refutation of the "happy landing" doctrine expounded by Judge Clark in his dissenting opinion, *Southern S. S. Co. v. N. L. R. B.*, 120 Fed. (2d) 505, 511-514 (C. C. A. 3).

(53) Senate Document No. 228, 65th Cong., 2nd Sess., American Sea Power and the Seamen's Act, p. 17.

(54) See Appendix, infra, pp. 50-53

> obstructions to the free flow of waterborne commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and the prompt and orderly settlement of all disputes concerning rates of pay, hours of employment, rules, or working conditions, including disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, hours of employment, rules, or working conditions."

The mutiny and revolt laws are entirely consistent with the labor relations policy of the United States. Strikes on the high seas or in an unsafe port, endangering the vessel, may be unlawful. They are, however, entirely valid when they occur in a safe port and when, as here, the vessel is moored securely to the dock.

This is the conclusion reached by the Maritime Labor Board in its exhaustive report of March 1, 1940.[55] It is there recommended

> "The Navigation Laws of the United States or any other laws relating to seamen should not be so construed as to abrogate the right of seamen to strike in domestic harbors" (p. 3).

In explanation of this recommendation, the Board stated:

> "It is the declared policy of the United States, as expressed in section 1001 of title X, * * * to eliminate the causes of certain substantial obstructions to the free flow of water-borne commerce and to mitigate and eliminate these obstructions when they have occurred * * *' but it is not a part of this policy to prohibit lawful strikes by seafaring men. Thus, the purpose of title X is to eliminate, as nearly as is possible, the causes which may lead to strikes in the maritime industry, but not to penalize seafaring men for exercising their right to engage in lawful strikes when in their judgment such strikes are unavoidable as a means of protecting their economic interests. The recommenda-

(55) The report was made by the Maritime Labor Board, created by the 1938 amendments, in compliance with Section 1260, providing for the submission of a report to the President by March 1, 1940.

tion of the Board that certificates and licenses of seafaring men should not be revoked for engaging in lawful strikes is fully in keeping with the declared policy of the United States, which seeks to establish peaceful labor relations in the maritime industry by means of advancing the principles and practices of collective bargaining, rather than by imposing legal restrictions upon the rights of maritime employees which are not applicable to other workers." [56]

CONCLUSION

The story of the seaman's struggle for security is the story of the struggle of all labor. His emancipation, however, has been longer delayed because of effective segregation from other workers at the instance of his employer. The past century has witnessed the slow and bitterly yielded recovery of this once lost equality. But opprobrium still underlies the characterization of "ward". And petitioner here would resurrect and perpetuate the ancient status of inferiority.

The seaman is a human being. He is impelled by the same inexorable economic drives as other workers. He seeks the same economic and legal remedies. These petitioner would deny to him by depriving him of his most effective weapon, the right to strike.

In an era of swiftly moving, power driven vessels, when cargo is both loaded and unloaded in every port of call, and where a port of call on one voyage frequently is a port of termination on another, where such ports are by their very selection the safest ports and physically contiguous to responsible civil authority, when the home office of the employer can be reached almost instantaneously through telephone and wireless, there can be no justification for the arbitrary limitation of the right to strike to but one port. Permit this and it follows that the day and the

(56) For the Board's full report on the subject, see Appendix, infra, pp. 47-49.

hour to strike may also be regulated. Complete prohibition will not be far distant.

The issue here transcends the immediate facts. If seamen are entitled to the same protection enjoyed by shore workers, their right to engage in concerted activity must be equally recognized. When the vessel is moored to the dock, in a safe harbor and the peril of the sea ceases, the vessel becomes for all intents and purposes, an industrial plant. At that point, distinction between sailor and factory worker stops and both may with impunity cease work in concert with others retaining their status as employees, provided only that their conduct does not endanger life or property. The safety of the vessel, not the name of the port, should determine the legality of a seaman's strike.

Respectfully submitted,

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APPENDIX

MARITIME LABOR BOARD REPORT TO THE PRESIDENT AND TO THE CONGRESS MARCH 1, 1940

SUMMARY OF PROPOSED AMENDMENTS TO TITLE X

Section 1002

"2. The navigation laws of the United States or any other laws relating to seamen should not be so construed as to abrogate the right of seamen to strike in domestic harbors;" (p. 3).

REASONS FOR PROPOSED AMENDMENTS

Amendments to Section 1002

"The language of section 1002 pertaining to the National Labor Relations Act was obviously intended to protect seamen against unfair labor practices as they are defined in that act and to safeguard the right of seamen to organize and bargain collectively through their chosen representatives. But the provision of this section which reads, 'That nothing in this title shall constitute a repeal or otherwise affect the enforcement of any of the navigation laws of the United States or any other laws relating to seamen,' has cast some doubt upon the right of seamen to strike in domestic harbors when the vessel affected by the strike is safely moored to the dock. This doubt has arisen principally because of administration of the law relating to the creation of marine boards to investigate acts of incompetency or misconduct not committed in connection with a

marine casualty or accident. This law reads in part as follows:

> '(b) The Secretary of Commerce shall establish rules and regulations for the investigation of marine casualties and accidents not involving loss of life, any act in violation of any of the provisions of this title or of any of the regulations issued thereunder, and all cases of acts of incompetency or misconduct committed by any licensed officer or holder of a certificate of service while acting under the authority of his license or certificate of service, whether or not any of such acts are committed in connection with any marine casualty or accident * * *.'

"Investigations of acts of incompetency and misconduct not committed in connection with marine casualties and accidents are made by boards, known as C boards, which are composed of representatives of the Bureau of Marine Inspection and Navigation, and appointed by the Director of that Bureau.

"The law does not define 'acts of incompetency or misconduct', but a survey of the charges preferred by the Bureau of Marine Inspection and Navigation in a number of C board cases seems to indicate that the Bureau construes the term as encompassing any behavior legally reprehensible under the navigation laws. This connotation brings within the purview of the C boards actions ranging from drunkenness and fighting among crew members to refusal in violation of articles to obey a command issued by the master during a strike in a safe harbor.

"The significance of these investigations for maritime labor arises from the fact that actions characterized as misconduct may occur in connection with strikes or other union activity directed toward establishing or enforcing the collective-bargaining rights guaranteed to labor.

"The articles which all crew members in the foreign and intercoastal trade must sign provide, in part: '* * * the

said crew agree to conduct themselves in an orderly, faithful, honest, and sober manner, and to be at all times diligent in their respective duties, and to be obedient to the lawful commands of the said Master, * * *.' This provision can be interpreted to make any refusal to obey a command while under articles an act of misconduct, even when such refusal takes place in connection with a lawful strike in a domestic harbor when the vessel is safely moored.

"The Board is of the opinion that none of our navigation laws or other laws affecting seamen should be so construed as to make possible the suspension or revocation of certificates or licenses for engaging in lawful strikes.

"It is the declared policy of the United States, as expressed in Section 1001 of title X, '* * * to eliminate the causes of certain substantial obstructions to the free flow of water-borne commerce and to mitigate and eliminate these obstructions when they have occurred * * *' but it is not a part of this policy to prohibit lawful strikes by seafaring men. Thus, the purpose of title X is to eliminate, as nearly as is possible, the causes which may lead to strikes in the maritime industry, but not to penalize seafaring men for exercising their right to engage in lawful strikes when in their judgment such strikes are unavoidable as a means of protecting their economic interests. The recommendation of the Board that certificates and licenses of seafaring men should not be revoked for engaging in lawful strikes is fully in keeping with the declared policy of the United States, which seeks to establish peaceful labor relations in the maritime industry by means of advancing the principles and practices of collective bargaining, rather than by imposing legal restrictions upon the rights of maritime employees which are not applicable to other workers."

NATIONAL LABOR RELATIONS ACT

SECTION 1. The denial by employers of the right of employees to organize and the refusal by employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of comerce.

The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries.

Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

It is herby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

SEC. 2. When used in this Act—

(2) The term "employer" includes any person acting in the interest of an employer, directly or indirectly, but shall not include the United States, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or any one acting in the capacity of officer or agent of such labor organization.

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse.

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or

the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in the National Industrial Recovery Act (U. S. C., Supp. VII, title 15, secs. 701-712), as amended from time to time, or in any code or agreement approved or prescribed thereunder, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this Act as an unfair labor practice) to require as a condition of employment membership therein, if such labor organization is the representative of the employees as provided in section 9 (a), in the appropriate collective bargaining unit covered by such agreement when made.

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9 (a).

SEC. 13. Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike.

SEC. 564 (46 U. S. C. A.) *Shipping articles.* The master of every vessel bound from a port to the United States to any foreign port other than vessels engaged in trade between the United States and the British North American possessions, or the West India Islands, or Mexico, or of any vessel of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement, in writing or in print, with every seaman whom he carries to sea as one of the crew, in the manner hereinafter mentioned; and every such agreement shall be, as near as may be, in the form given in the table marked A, in the schedule annexed to this chapter, and shall be dated at the time of the first signature thereof, and shall be signed by the master before any seaman signs the same, and shall contain the following particulars:

First. The nature and, as far as practicable, the duration of the intended voyage or engagement, and the port or country at which the voyage is to terminate.

Second. The number and description of the crew, specifying their respective employments.

Third. The time at which each seaman is to be on board, to begin work.

Fourth. The capacity in which each seaman is to serve.

Fifth. The amount of wages which each seaman is to receive.

Sixth. A scale of the provisions which are to be furnished to each seaman.

Seventh. Any regulations as to conduct on board, and as to fines, short allowance of provisions, or other lawful punishments for misconduct, which may be sanctioned by Congress or authorized by the Secretary of Commerce not contrary to or not otherwise provided for by law, which the parties agree to adopt.

Eighth. Any stipulations in reference to advance and allotment of wages, or other matters not contrary to law.

SEC. 574 (46 U. S. C. A.) *Shipping articles for vessels in coasting trade.* Every master of any vessel of the burden of fifty tons or upward, bound from a port in one State to a port in any other than an adjoining State, except vessels of the burden of seventy-five tons or upward, bound from a port on the Atlantic to a port on the Pacific, or vice versa, shall, before he proceeds on such voyage, make an agreement in writing or in print, with every seaman on board such vessel except such as shall be apprentice or servant to himself or owners, declaring the voyage or term of time for which such seaman shall be shipped.

SEC. 483 (18 U. S. C. A.) (Criminal Code, section 292). *Inciting revolt or mutiny on shipboard.* Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, endeavors to make a revolt or mutiny on board such vessel, or combines, conspires, or confederates with any other person on board to make such revolt or mutiny, or solicits, incites, or stirs up any other of the crew to disobey or resist the lawful orders of the master or other officer of such vessel, or to refuse or neglect their proper duty on board thereof, or to betray their proper trust, or assembles with others in a tumultuous and mutinous manner, or makes a riot on board thereof,

or unlawfully confines the master or other commanding officer thereof, shall be fined not more than $1,000, or imprisoned not more than five years, or both.

SEC. 484 (18 U. S. C. A.) (Criminal Code, section 293). *Revolt or mutiny on shipboard.* Whoever, being of the crew of a vessel of the United States, on the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States, unlawfully and with force, or by fraud, or intimidation, usurps the command of such vessel from the master or other lawful officer in command thereof, or deprives him of authority and command on board, or resists or prevents him in the free and lawful exercise thereof, or transfers such authority and command to another not lawfully entitled thereto, is guilty of a revolt or mutiny, and shall be fined not more than $2,000 and imprisoned not more than ten years.